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Supreme Court, U.S.
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No. 99-978

IN THE

SUPREME COURT OF THE UNITED STATES

Warren J. Michaels, Executor,
Estate of Edna L. Nelson,
Petitioner,

v.

Bank of America N.T. & S.A. and
Citizens Federal Bank,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

SUMMARY

As will be shown herein, Bank of America's Brief in Opposition misstates the facts and Petitioner's legal arguments contained in the appellate record. The Bank's legal arguments and authority in support thereof are off point and therefore detracts from the inherently important federal and public issues raised in the Petition.

All of Bank of America's alleged facts in this Case are imputed from either a state court judgment subject to collateral attack for lack of jurisdiction or contained in the findings and orders of the bankruptcy judge who owned stock in the Bank on each occasion. Therefore, the Brief in Opposition detracts from and obscures the bankruptcy, jurisdictional, and judge conflict issues presented in the Petition which must be answered before any of Bank of America's alleged facts are supported by legal authority to be facts at all.

Petitioner will herein dispose of all of the misplaced issues raised in the Brief in Opposition. Petitioner will then show how the exclusive jurisdiction of the federal courts of bankruptcy matters, raised in the Petition, is inexorably intertwined with the firmly embedded clauses in the Constitution of the United States which provide for uniformity of bankruptcy law, supremacy of federal law, and the principle of federalism.

It is appropriate here to remember one of the most important utterances in the literature of constitutional law made by former Chief Justice John Marshall: "it is a *constitution* we are expounding." *McCulloch v. Maryland*, 17 US (4 Wheat.) 316 (1819). With this utterance in mind, what issues could be more important than the integrity of the federal judiciary and the Constitutional grant of plenary power to establish uniform and supreme federal law on the subject of bankruptcy to the exclusion of the state courts?

MISSTATEMENTS OF FACTS IN THE RECORD

In its Brief in Opposition, Bank of America makes material misstatements of facts contained in the appellate record in its Introduction, Statement of the Case, and Arguments. The misstatements concern the identity of the foreclosing entity and the facts concerning the bankruptcy judge's disqualification. These misstatements will be addressed in this reply under the appropriate heading, infra.

REPLY TO RESPONDENT'S ARGUMENTS

A. Res Judicata and Collateral Estoppel Do Not Bar Nelson's Federal Court Challenges to the Bank's Claim of Right to Foreclose.

Bank of America argues that no reason exists for this Court to review the ruling of the Ninth Circuit barring Petitioner's claims by reason of res judicata and collateral estoppel, citing *First National Bank v. Russell (In re Russell)*, 76 F.3d 242, 245 (9th Cir.1996). (p. 5). ("*Russell*").

To the contrary, the Ninth's Circuit's opinion is extremely erroneous and the authority cited is also extremely important because it is intrusive of the exclusive jurisdiction of the federal courts of bankruptcy matters.

There are two fallacies in the Ninth Circuit's decision. First, a state court judgment entered in a case that falls within the federal courts' exclusive jurisdiction is subject to collateral attack in the federal courts. *Kalb v. Feuerstein*, 308 U.S. 433 (1940). Second, the holding in *Russell* applied California res judicata and collateral estoppel doctrine to a state court judgment to bar a discrimination claim arising under 42 U.S.C. § 1981 subsequently filed in the bankruptcy court. The fallacy is that a state court may adjudicate a federal discrimination claim because it does not fall within the exclusive jurisdiction of the federal courts.

Petitioner's claims fall within the exclusive jurisdiction of the federal bankruptcy court because they are core bankruptcy proceedings.

The determination of the validity of liens is defined as a core bankruptcy proceeding by statute. 28 U.S.C. § 157(b)(2)(k). A claim under 11 U.S.C. § 362(h) arises under Title 11 and has also been held to be a core proceeding. *Johnston Environmental Corp. v. Knight (In re Goodman)*, 991 F.2d 613, 617 (9th Cir.1993). ("*Goodman*"). These core bankruptcy claims also arise out of the core proceedings in the Bankruptcy Case, including, the relief granted from the automatic stay and the Stipulation in settlement of Ms. Nelson's claims against the debtor under Sections 523 and 727 of Title 11. In clear and unequivocal language, the Stipulation provides Petitioner with the right to contest the validity of the lien under the reserved jurisdiction of the Bankruptcy Court. (App. 13 & 19). Bankruptcy courts must retain jurisdiction to construe their own orders and a request to the court to do so has been held to arise under the Bankruptcy Code. *Beneficial Trust Deeds v. Franklin (In re Franklin)*, 802 F.2d 324, 326 (9th Cir.1986).

The exclusive federal jurisdiction of the federal courts of core bankruptcy proceedings may be relinquished only by abstention under 28 U.S.C. §1334 (c)(1) discussed, infra.

B. Ms. Nelson and Her Estate Possess Standing.

Petitioner possesses independent standing under Section 362(h) of the Bankruptcy Code, the Stipulation, and Ninth Circuit authority.

" An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h).

In clear and unequivocal language, the Stipulation provides Petitioner with the right to contest the validity of the

lien under the reserved jurisdiction of the Bankruptcy Court. (App. 13 & 19).

Under Ninth Circuit authority, creditors have standing to attack a violation of the automatic stay. *Goodman*, 991 F.2d 613, 618 (9th Cir.1993). Persons who are directly and adversely affected pecuniarily by an order of the bankruptcy court have standing to appeal the order. *Everex Systems, Inc. v. Cadtrak Corp. (In re CFLC, Inc.)*, 89 F.3d 673, 675-676 (9th Cir.1996). ("*Everex*")

All of Bank of America's cited authority on standing is misplaced. The primary authority cited by the Bank is in *Tilley v. Vucurevich (In re Pecan Groves of Arizona)*, 951 F.2d 242 (9th Cir.1991). (pp. 5, 6, & 8). There, the intervenor appealed rather than the original party to the lawsuit. The requirement of the intervenor's independent standing was pointed out in *Everex* at 675. In the other authorities cited by the Bank, the litigants lacked standing because they were not pre-petition creditors in those bankruptcy cases.

Bank of America's authorities cited in support of its argument that the bankruptcy court lacked jurisdiction of the lien issue because Lot 13 was sold to a third party and passed outside of the estate is also misplaced. In one of those cases cited, the adversary proceeding involved an issue not related to the administration of the bankruptcy case and in the other a procedural error was determined to be not so egregious.

In this case, the orders of the bankruptcy court and the conduct of the debtor, a bankruptcy attorney, the bankruptcy judge, and the Bank Respondents have adversely affected Ms. Nelson and Petitioner. Moreover, multiple due process violations occurred during the pendency and in the heart and soul of the core bankruptcy case, discussed, infra. Here, if the property passed out of the estate at all, it was subject to Ms. Nelson's right to contest the lien under the jurisdiction of the bankruptcy court. Bank of America did not object to the Stipulation and it was noticed and given the opportunity to object prior to the foreclosure sale.

C. The Bankruptcy Judge Lacked Jurisdiction and the Power to Order Relief from the Stay Based on His Actual Ownership of Stock in Bank of America.[1]

The Ninth Circuit failed to apply its own statements in a near identical situation as in Petitioner's case. *Davis v. Xerox*, 811 F.2d 1293 (9th Cir.1987). A disqualification objection was timely when discovered on appeal and brought to the attention of the appeals court. *Id.* 1296. ("Where the express statute standard has been violated and a judge has sat whom Congress has disqualified from sitting, the disqualified judge's rulings are, on appeal, to be vacated."). In Petitioner's case, the objective contention "What the judge has publicly declared he owns, he *knows* he owns" certainly would apply. *Id.*

Contrary to Bank of America's misleading statements (p. 6), Petitioner's motion to disqualify the judge from *further* proceeding in the Adversary Proceeding was denied without prejudice by a "disinterested [bankruptcy] judge" at a hearing after Ms. Nelson requested the Ninth Circuit to take judicial notice of the motion. Not in the appellate record is the fact that the judge properly concluded that the bankruptcy court did not have jurisdiction of the matter because the case was pending in the Ninth Circuit. Contrary to the Bank's claim, the discovery of the disqualification facts did not occur until in or about July of 1997. The court of appeals denied Ms. Nelson's motion for summary reversal, including her alternative request to amend her brief to include the disqualification issue, but referred her request for judicial notice to the merit panel. (App.-03).

Although the denial of a motion to disqualify a judge is interlocutory *United States v. Washington*, 573 F.2d 1121,

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[1] In a recent hearing in related cases on remand, heard on January 13, 2000, the bankruptcy judge admitted that he was disqualified during the pendency of the bankruptcy case. Petitioner will file a supplemental brief immediately after receipt of the transcript of the hearing.

1122 (9th Cir.1978), the damage caused by the disqualified bankruptcy judge had already been done. The judge's plain disqualification coupled with its effect on the issues on appeal and brought to the attention of the appellate court by judicial notice should have been considered. (See *Id.* 1123).

Bank of America's laches argument also fails. *Costello v. United States*, 365 US 265, 282 (1961). ("Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."). Ms. Nelson did not know of the judge's conflict until the case was pending in the court of appeals. Also, there can be no prejudice to the Banks if they perpetrated the frauds as alleged in the complaint. Although 28 U.S.C. § 455(b)(4) is controlling in this case, Rule 60(b)(4) (void judgments) and independent action for fraud upon the court (the complaint) under the Federal Rules of Civil Procedure are more appropriate than the authority cited by the Bank.

D. Relief from the Stay was not Obtained Lawfully and the Proper Entity, if any, is Unknown.

Contrary to Bank of America's claims, the complaint alleges that neither Bank was the owner of the deed of trust (party in interest) and that they perpetrated a fraud on the court. These issues must be decided before a federal judge who does not hold a financial interest in the Banks. Federal courts have inherent power to investigate whether a judgment was obtained by fraud. *Universal Oil Products Co. v. Root Refining Co.*, 328 US 575, 580 (1946). In the words of former Justice Roberts: "No fraud is more odious than an attempt to subvert the administration of justice." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 US 238, 251 (1944). When a fraud has been practiced upon it, a court has both the duty and the power to vacate its own judgment or restrain the beneficiaries of the judgment from taking any benefit from it. *Id.* 245-250.

Bank of America's use of the phrase "Citizens was actually the beneficiary" (p. 3) is misleading because the complaint uses the phrase "claimed beneficiary" (ER 39-40). The Bank's claim that Citizens did not foreclose is also misleading and false. (p. 1). The Trustee's Deed Upon Sale states under penalty of perjury that Citizens was the foreclosing beneficiary and grantee. (ER 120-121). These distinctions are important in stay relief motions.

Another misleading statement is "Nelson knew in July of 1992 that Bank of America had obtained relief" (p. 2). Ms. Nelson first became aware that the judge had granted relief from the stay to Bank of America on July 29, 1992.

Ms. Nelson has standing to contest the relief from stay order. Multiple violations of due process occurred here. Both Ms. Nelson and the debtor were not noticed of the motion. Ms. Nelson was to be the recipient of the property in settlement of her fraud claim against debtor and therefore stepped into the shoes of debtor. Restatement (Second) of Judgments, 209-210 (1982). And, the bankruptcy judge owned stock in the Bank.

E. Petitioner's Abstention Argument is an Integral Component of Statutory Interpretation of Section 1334 of the Judicial Code. Abstention is the Only Mechanism Available to a Federal Court to Relinquish its Exclusive Jurisdiction of Bankruptcy Matters and Route Them to a State Court.

Contrary to Bank of America's claim (p. 9), Ms. Nelson asserted the exclusive jurisdiction of the district court under 28 U.S.C. § 1334, delegated to the bankruptcy court under 28 U.S.C. §157(a) & (b) in her opening brief on page 58. In fact, almost every argument in her brief addresses core bankruptcy issues and the exclusive jurisdiction of the bankruptcy court. The abstention clauses in 28 U.S.C. § 1334 are the only mechanism available for the federal courts to relinquish their exclusive jurisdiction of bankruptcy matters.

The state court barred Ms. Nelson's entire complaint by applying the doctrines of res judicata and collateral estoppel to the bankruptcy Stipulation. (App.-54). Prior to this judgment, the state court "wholesale adopted" findings of fact", prepared by Bank of America's attorney, which intruded upon the "lien contest" clause in the Stipulation. This, the state court could not do without intruding into the exclusive jurisdiction of the federal courts.

The Constitution limits state power. U.S. CONST. amend. X. The Constitution delegates few but defined and enumerated plenary powers to Congress. See U.S. CONST. art I, § 8. Included therein is the power to establish uniform laws on the subject of bankruptcies throughout the United States. U.S.CONST. art. I, §8, cl. 4. The Constitution provides Congress with the power to make all laws necessary and proper for carrying out the powers enumerated in Section 8 of Article 1 and all other powers vested in the Government of the United States. U.S. CONST. art. I, §8, cl. 18. The judicial power of the United States is vested in one Supreme Court and in such other inferior courts, which Congress may establish. U.S. CONST. art. III, § 1. The Constitution and the laws of the United States made in pursuance thereof are supreme. U.S. CONST. art. VI, cl. 2.

Congress exercised its plenary power to establish uniform laws on the subject of bankruptcy and created and provided for the inferior federal courts, to the exclusion of the states, to administer the bankruptcy laws in accordance with its prerogatives under the Constitution.

On June 25, 1948, Congress revised, codified, and enacted into law Title 28 of the United States Code. 62 Stat 869-1008. The district courts jurisdiction of bankruptcy matters and proceedings was original and exclusive of the state courts. 62 Stat 931. (App. 48).

Under the 1948 Act, Congress granted the district courts original jurisdiction, exclusive of the state courts, in only six other subject matter areas. (See 62 Stat 931-934).

On November 6, 1978, Congress enacted the Bankruptcy Reform Act of 1978, an act to establish a uniform law on the subject of bankruptcy. 92 Stat 2549. Under Section 241(a) of the 1978 Act, Congress employed a jurisdictional statutory scheme codified at 28 USC § 1471. Congressional intent under the 1978 Act was to broadly expand the jurisdiction of the bankruptcy court. The Court held that the broad grant of jurisdiction to the bankruptcy courts contained in 28 USC § 1471 is unconstitutional. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 US 50, 87 (1982). ("*Marathon*").

In response to the *Marathon* decision, on July 10, 1984, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984. 98 Stat 333. Section 101(a) of the 1984 Act amended Section 1334 of Title 28 of the United States Code. Congress has since enacted amendments to Section 1334 that are not relevant to the issues here.

Under Section 1334 of the current Judicial Code, the jurisdiction of the district court which is delegated to the bankruptcy court under 28 U.S.C. § 157(a) is original and exclusive in almost every conceivable way. The only exception is in subsection (b) where the jurisdiction is original but not exclusive. (See App. 48-49). This exception performs two functions. First, it provides the district and bankruptcy courts original jurisdiction even in cases where Congress has provided other courts with exclusive jurisdiction. The second function, which is relevant to this case, allows the federal courts to abstain under subsections (c)(1) & (2). It is a necessary prerequisite to the power to abstain. (See 1 Collier on Bankruptcy, ¶3.01[4] (Mathew Bender 15th Ed. Revised 1999). Abstention is defined as "A federal court's relinquishment of jurisdiction when necessary to avoid needless conflict with a state's administration of its own affairs." Blacks Law Dictionary (West Group 1999). Thus, state courts cannot hear core bankruptcy matters unless the federal courts abstain.

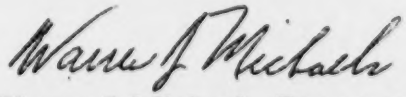
In *Marathon* the Court held Congress' statutory scheme under the Bankruptcy Reform Act of 1978 unconstitutional. In this case, the Court should uphold Congress' Constitutional prerogative to grant jurisdiction of bankruptcy matters to the district court and the bankruptcy court, exclusive of the State courts, unless abstention is granted under either Section 1334(c)(1) or (2) of the current Judicial Code of the United States.

CONCLUSION

That the highest court in the land may grant a common person the opportunity to argue the interpretation and application of the Judicial Code before it is testimony to the greatness and strength of the United States of America.

This Court should grant the petition for a writ of certiorari because of the extreme importance of the statutory provisions involved under the Judicial Code. The strict application of Section 455(b)(4) promotes public confidence in the integrity of Our judicial branch of government. The interpretation and application of Section 1334 rises to the height of the most historic issues presented to this Court because this statutory provision affects the fundamental principals of federalism, supremacy, and uniformity of law that We provided for in the clauses of Our Constitution.

Respectfully submitted,



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